



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 21 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Richard Jaussi

RE: MUR 6558
Brian Jenkins

Orem, Utah 84058

Dear Mr. Jaussi:

On November 8, 2012, the Federal Election Commission ("Commission") reviewed the allegations in your Complaint dated April 13, 2012, and found that on the basis of the information provided in your Complaint, information provided by the Respondent, and other available information, that there is no reason to believe that Brian Jenkins violated 2 U.S.C. § 432(e)(1). The Commission also decided to dismiss the allegation that Brian Jenkins violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11. Accordingly, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003); Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a Complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Anthony Herman
General Counsel

BY: Kathleen Guith
Deputy Associate General Counsel

Enclosure
Factual and Legal Analysis

12044322696

12044322697

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Brian Jenkins

MUR: 6558

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by Todd Weiler and Richard Jaussi, alleging violations of the Federal Election Campaign Act of 1971, as amended, (the "Act") by Brian Jenkins.

II. FACTUAL AND LEGAL ANALYSIS

The Complaint in this matter alleges that Jenkins, a candidate for the Republican nomination for United States Representative for the 3rd Congressional District of Utah, violated the Act when he failed to file a Statement of Candidacy, Statement of Organization, and the required disclosure reports with the Commission. Compl. at 1. The Complaint also alleges that Jenkins placed automated calls identifying himself as a candidate for Congress to 4,000 delegates attending the Utah Republican Party state convention, and that these automated calls to delegates did not include required disclaimers in violation of the Act. *Id.* at 2.

Because there is no available information to indicate that Jenkins exceeded the \$5,000 threshold to become a candidate under 2 U.S.C. § 431(2) and trigger any reporting obligations under 2 U.S.C. § 432(e)(1), the Commission finds no reason to believe that Jenkins violated 2 U.S.C. § 432(e)(1) by failing to file a Statement of Candidacy. The Commission exercises its prosecutorial discretion and dismisses the allegations that Jenkins violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by failing to include the required disclaimers on automated calls placed to delegates.

A. Factual Summary

Brian Jenkins sought the Republican nomination for United States Representative for the 3rd Congressional District at the Utah Republican Party state convention, which was held on April 21, 2012. On March 14, 2012, Jenkins filed a Declaration of Candidacy with the State of Utah. Brian Jenkins Declaration of Candidacy,

<http://www.elections.utah.gov/Media/Default/2012%20Candidate%20Filings%20%20Thursday%2015/Emaillet%20Candidate%20Filings/Brian%20Jenkins%20US%20House%203.pdf>

("Declaration"); *see* UTAH CODE § 20A-9-201 (requiring individuals wishing to run for Congress to submit a Declaration of Candidacy and pay a filing fee). In an Affidavit of Impecuniosity filed with his Declaration, Jenkins attested that, "owing to my poverty, I am unable to file the filing fee required by law." *Id.*; *see* UTAH CODE § 20A-9-201(5)(d) (stating that a candidate "may file a declaration of candidacy without payment of the filing fee upon a prima facie showing of impecuniosity as evidenced by an affidavit of impecuniosity filed with the filing officer").

According to the Complaint, on or around April 10, 2012, Jenkins placed automated telephone calls to the 4,000 delegates attending the Utah Republican Party's state convention. Compl. at 2. The Complaint did not include a recording or transcript of the call, but states that Jenkins clearly identified himself as "Brian Jenkins, Candidate for Congress," and "proceed[ed] with his message to instill fear and mistrust in the election process, state party officers, etc., which is a common theme of his campaign rhetoric." *Id.* The Complaint alleges that the message did not identify who paid for the call. *Id.*

To support the claim that Jenkins was a candidate, the Complaint also mentions that that Jenkins has created a website, but does not identify a web address. The Office of the General

12044322698

Counsel has identified two possible websites associated with Jenkins, www.brianforutah.com and www.brianforutah.info. Although the Commission does not know what may have been paid for these websites, it appears that these websites may have been created at no cost and hosted for a modest monthly cost.

Jenkins did not secure the Republican nomination at the convention, receiving the votes of 29 of the 947 delegates, or 3.06% of the vote. Jenkins did not file with the Commission a Statement of Candidacy, designate or register a principal campaign committee, or file any disclosure reports.¹

B. Legal Analysis

1. Failure to File Statement of Candidacy, Statement of Organization, and Pre-Convention Report

The Complaint alleges that Jenkins failed to file: (1) a timely Statement of Candidacy; (2) a timely Statement of Organization; and (3) a pre-convention report disclosing receipts and disbursements. Compl. at 1-2. The Complaint bases these allegations on the fact that Jenkins created a campaign website, made "countless appearances to campaign events," made "numerous references to himself as a 'candidate for congress,'" and then subsequently paid a \$435 filing fee on March 15, 2012. Compl. at 1. In response, Jenkins generally denies the allegations and argues that the complainants fail to provide proof other than their "own self conclusory statements supported by no evidence." Resp. at 2.

An individual seeking nomination for election becomes a candidate under the Act when that individual receives contributions or makes expenditures aggregating in excess of \$5,000. 2 U.S.C. § 431(2); *see also* 11 C.F.R. § 100.3(a). The Act defines a contribution as "any gift,

¹ Jenkins also unsuccessfully sought the Republican nomination for United States Senate in 2006 and United States Representative for the 2nd Congressional District in 2008. He also did not file a Statement of Candidacy, designate or register a principal campaign committee, or file any disclosure reports with the Commission for those races.

12044322699

1 subscription, loan, advance, or deposit of money or anything of value made by any person for the
2 purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also*
3 11 C.F.R. § 100.52. An expenditure is defined as "any purchase, payment, distribution, loan,
4 advance, deposit, or gift of money or anything of value, made by any person for the purpose of
5 influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i); *see also* 11 C.F.R.
6 § 100.111. Ballot access fees paid by a candidate are expenditures that count towards the \$5,000
7 threshold under 2 U.S.C. § 431(2).

8 A candidate must file a Statement of Candidacy within 15 days after becoming a
9 candidate. 11 C.F.R. § 101.1(a). The candidate also must designate a principal campaign
10 committee on a Statement of Candidacy filed with the Commission. 2 U.S.C. § 432(e)(1);
11 11 C.F.R. § 101.1(a). Each authorized political committee of a candidate must register with the
12 Commission by filing a Statement of Organization, and file reports disclosing contributions and
13 expenditures. 2 U.S.C. §§ 433, 434(a); 11 C.F.R. §§ 102.1(a), 104.1(a), 104.5. Accordingly, if
14 Jenkins received contributions or made expenditures aggregating in excess of \$5,000, he was a
15 candidate pursuant to 2 U.S.C. § 431(2), and was required to file a Statement of Candidacy and
16 designate a principle campaign committee, which would have to file a Statement of Organization
17 and periodic reports disclosing the committee's receipts and disbursements.

18 Here, the available information is not sufficient to establish reason to believe that Jenkins
19 became a candidate under the Act.² The available information supports the Complaint's
20 assertion that Jenkins made disbursements for campaign websites and automated calls to
21 convention delegates. Moreover, because Jenkins reportedly used the state party treasurer's

² Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (The Commission finds "reason to believe" in matters where the available evidence is "at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation.")

1 calling equipment to make the calls, Jenkins may have accepted an in-kind contribution from the
2 state party treasurer if he was not charged the usual and normal rate for use of the equipment.
3 *See* 11 C.F.R. § 100.52(d)(1). These receipts and disbursements, however, appear to be minimal
4 and appear to fall below the \$5,000 threshold at 2 U.S.C. § 431(2). The amounts disbursed in
5 connection with the automated calls to the delegates were likely small.³ Finally, while ballot
6 access fees are expenditures, contrary to the Complaint's assertion that Jenkins paid a \$435 filing
7 fee on March 15, 2012, as noted above, his filing with the State of Utah indicates that he
8 received a waiver of the filing fee due to his inability to pay. Accordingly, the total of Jenkins's
9 known expenditures appears to have been less than the \$5,000 threshold under 2 U.S.C. § 431(2).

10 Moreover, while it appears that one of the websites solicited donations, the Commission
11 has no information suggesting that Jenkins solicited or raised more than the \$5,000 threshold
12 under 2 U.S.C. § 431(2). To the contrary, it appears that Jenkins solicited small contributions
13 and used volunteers, since the website encourages potential donors to make \$5 contributions to a
14 "[s]mall, efficient campaign[] in which everyone is donating their time and money." *See* 11
15 C.F.R. § 100.74 (exempting volunteer services from the definition of contribution). Even if the
16 Commission were to take into account the value of the websites and robocalls, it is likely that
17 their cost was minimal and there is no available information that Jenkins received in excess of
18 \$5,000 in contributions.

19 The available evidence does not provide a clear basis on which to find reason to believe
20 and investigate whether Jenkins met or exceeded the \$5,000 threshold to become a candidate and
21 trigger any reporting obligations under the Act pursuant to 2 U.S.C. § 431(2). Jenkins appears to

³ A press report indicates that Jenkins paid "about \$75" to place the automated calls to about 4,000 delegates using the state party treasurer's calling equipment. Ladd Brubaker, *Utah GOP Convention Going Electronic, But Not Without Controversy*, DESERET NEWS (Apr. 16, 2012), <http://www.deseretnews.com/article/865554164/Utah-GOP-convention-going-electronic-but-not-without-controversy.html?pg=all>.

1 have received a waiver of the State of Utah's filing fee "owing to [his] poverty," spent "about
2 \$75" on automated calls to 4,000 delegates, created two websites, solicited small contributions
3 and volunteers on one of his websites, and received only 3.06% of the vote. Accordingly, the
4 Commission finds no reason to believe that Jenkins violated 2 U.S.C. § 432(e)(1) by failing to
5 file a Statement of Candidacy.

6 **2. Failure to Include Disclaimers**

7 The Complaint alleges that Jenkins violated the Act by failing "to provide appropriate
8 and necessary disclosures as required by BCRA for robodialed calls to delegates" that were made
9 on or about April 10, 2012. Compl. at 2.

10 The Act and Commission regulations require a disclaimer when: (1) a political committee
11 makes a disbursement for the purpose of financing a public communication, electronic mail of
12 more than 500 substantially similar communications, or internet website; (2) any person makes a
13 disbursement for the purpose of financing public communications expressly advocating the
14 election or defeat of a clearly identified candidate; (3) any person solicits any contribution
15 through a public communication; and (4) any person makes a disbursement for an electioneering
16 communication. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a). A "public communication" is
17 defined as a "communication by means of any broadcast, cable, or satellite communication,
18 newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the
19 general public, or any other form of general public political advertising." 11 C.F.R. § 100.26.
20 A telephone bank "means more than 500 telephone calls of an identical or substantially similar
21 nature within any 30-day period." 2 U.S.C. § 431(24); 11 C.F.R. § 100.28.

22 If a communication requires a disclaimer and is paid for and authorized by a candidate,
23 authorized political committee of a candidate, or its agents, the disclaimer shall clearly state that

12044322702

1 the communication has been paid for by such authorized political committee. 2 U.S.C.
2 § 441d(a)(1); 11 C.F.R. § 110.11(b)(1). Disclaimers must be presented in a "clear and
3 conspicuous manner" to give the listener "adequate notice of the identity of the person or
4 political committee that paid for and, where required, that authorized the communication."
5 11 C.F.R. § 110.11(c)(1).

6 Given the paucity of the factual record and the small scope of the activity — 4,000 calls
7 at a reported cost of \$75 — and the fact that Jenkins reportedly identified himself as responsible
8 for the call, pursuing this matter with an investigation would not be an efficient use of the
9 Commission's resources. *See Heckler v. Chaney*, 470 U.S. 821 (1985); *cf.* First Gen. Counsel's
10 Rpt. at 8, MUR 6125 (McClintock) (recommending that the Commission dismiss allegations that
11 automated calls did not include the appropriate disclaimers and send a cautionary letter because
12 the matter would require an investigation to determine the contents of calls, the respondents
13 provided sworn assertions that they recorded the call with a disclaimer, the amount in violation
14 was small, and the omission was likely a result of vendor error). Accordingly, the Commission
15 exercises its prosecutorial discretion and dismisses the allegations that Jenkins violated 2 U.S.C.
16 § 441d and 11 C.F.R. § 110.11 by failing to include the required disclaimers on automated calls
17 placed to delegates.

12044322703